SUPREME COURT, U. S.
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MICHAEL RODAK, JR.,

No. 74-739

In the Supreme Court of the United States
OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER,

v.

STATE OF CALIFORNIA, et al., and JAMES COAN

and the

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR RESPONDENTS JAMES COAN AND CALIFORNIA STATE EMPLOYEES' ASSOCIATION IN OPPOSITION

LOREN E. McMASTER
California State Employees' Association
1108 "O" Street, Room 327
Sacramento, California 95814
Telephone: (916) 444-8134

Attorney for Respondents James Coan and the California State Employees' Association

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OPINIONS BELOW

The opinion references are adequately set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether the instant case is a proper one for the exercise of the Court's certiorari power where the question presented no longer is of any substantial continuing importance.

2. Whether section 218 of the Economic Stabilization Act of 1970 precludes enforcement of the Act, and orders and regulations issued pursuant to it, after the expiration of the Act on April 30, 1974.

STATUTES INVOLVED

The statutes involved are adequately set forth in the petition.

STATEMENT

On July 1, 1973, the California Budget Act of 1973, Cal.Stats. 1973, Chapter 129, became effective. The budget provided for salary increases for state employees ranging from 0% to 30%, depending upon the particular civil service classification. The average (mean) salary increase was 12.9%. The Cost of Living Council (CLC) issued a Notice of Challenge restraining implementation of the salary program until a hearing was held and a Decision and Order issued. On July 12, 1973, respondents James Coan and CSEA filed a petition for writ of mandamus in the California Supreme Court seeking an order compelling the State of California

and named officials to pay the salaries contained in the Budget Act of 1973, notwithstanding any action by the CLC.

The CLC issued its Decision and Order on August 29, 1973, disallowing salary increases above an average of 7%. On September 7, 1973, CSEA filed a request for modification or rescission of the decision and requested a hearing. On September 8, 1973, the State of California filed a Request for Review.

On October 2, 1973, the State of California enacted SB 1461, Collier, Cal.Stats. 1973, Chapter 1136. This statute did not constitute an escrow arrangement since there was no agreement concerning such between employer and employees, and there was no intent to pay said sums upon expiration of controls. The statute was passed for the expressed purpose of preventing the appropriated funds from reverting to the "General Fund" for other state programs, and not to obviate any federal economic regulation.

On April 19, 1974, the California Supreme Court decided Coan and CSEA v. California, 11 Cal.3d 286 (1974), ordering the State of California to pay the salaries contained in the California Budget Act of 1973. On April 30, 1974, the Economic Stabilization Act of 1970, as amended, expired, and by virtue of section 218 of said Act, the authority to issue and enforce orders and regulations likewise expired. Notwithstanding the order of the California Supreme Court, the expiration of the Economic Stabilization Act, and the absence of an enforceable wage order, California did not pay the salary increases contained in the Budget Act of 1973, thereby clearly indicating that the Collier Bill, Cal.Stats. 1973, Chapter 1136, was not an escrow measure.

Contrary to the representation of petitioner, California did not state that it would immediately pay the increases upon the expiration of the Act. Rather, despite the demands of the California State Employees' Association, the State of California refused to pay such increases, and stated that such increases would not be paid until the mandate of the California Supreme Court issued compelling such payment.1/ The failure to pay or to take steps in preparing to pay the increases after the mandate of the California Supreme Court issued would have placed the State of California in contempt of that Court. (See Petition, Appendix A, pp. 12a-13a.)

On May 8, 1974, more than a week after the expiration of the Economic Stabilization Act and its attendant authority, the United States filed a complaint for injunctive relief in United States District Court for the Eastern District of California (Civil Action No. S 74-186) (Record, pp. 1-62). The complaint conceded that "[a]t all times defendants herein have complied with said Decision and Order and have not paid out any salaries or wages in excess of said Decision and Order." (Record on Appeal, p. 3; Petition, Appendix A, pp. 11a-12a.) The District Court granted the Government's request for a preliminary injunction.

The District Court's decision was appealed by both James Coan and the California State

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1/ The decision of the California Supreme Court became final on May 19, 1974, at which time the mandate of the Court would have issued had not the Federal Government obtained an injunction in the United States District Court on May 17, 1974.

Employees' Association and the State of California to the Temporary Emergency Court of Appeals. The Emergency Court reversed, holding that in light of section 218 of the Act, the District Court lacked jurisdiction to issue preliminary injunctive relief. The Court held that the Government had failed to demonstrate any violation of the Act on the part of California and that no enforcement proceeding predicated upon acts committed by California during the period of controls was pending (Petition, Appendix A). The Government's petitions for rehearing and rehearing en banc were denied.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because the questions presented by the petition concern only matters involving the interpretation of an expired statute and thereby lack any substantial continuing importance. Certiorari is not appropriate to such review of expired statutes.

Section 218 of the Economic Stabilization Act of 1970, as amended, specifically provides that the authority of the Government to enforce any orders of the CLC expired on April 30, 1974. The Government is unable to bring itself within either of the two exceptions to section 218. There have been no acts in violation of the Economic Stabilization Act or its attendant orders and regulations committed while that law was in effect, as the Government has expressly conceded. Furthermore, no enforcement proceeding was brought by the Government against California prior to the expiration of the Act; hence, no such proceeding was pending on April 30, 1974.

The General Savings Statute, 1 U.S.C. § 109, only operates to preserve liability which may have been incurred under a temporary statute

prior to its expiration. It does not, as the Government impliedly asserts, continue the effectiveness of a temporary statute indefinitely. Since no liability was incurred by California under the Act prior to its expiration, as the Government has conceded, the General Savings Statute is inapplicable.

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE QUESTIONS PRESENTED HAVE NO CONTINUING IMPORTANCE 2/

The question presented by the petition for a writ of certiorari is one of statutory interpretation--whether the Government can continue to enforce an

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2/ The Solicitor General has made this identical argument in another case pending before this Court involving the same statute. Fry v. United States, No. 73-822. (See the Solicitor General's Motion to Dismiss the Writ of Certiorari and the Solicitor General's Brief for the United States.)

If this argument was applicable in Fry, a case which directly involved the constitutional question of congressional power to regulate state salaries, then a fortiorari it is applicable to the instant proceeding, a case which involves questions of statutory interpretations of a long expired act.

Counsel has been informed that the Solicitor General has filed a letter with the Court in the Fry case in which he purports to withdraw his argument on this point. While the Solicitor General may

order of the Cost of Living Council after the expiration of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended by P.L. 92-210, 85 Stat. 743 and P.L. 93-28, 87 Stat. 27. The complaint for injunctive relief in this case was filed in the United States District Court, Eastern District of California, on May 8, 1974, to consider whether a decision ordering the payment of salaries to state employees in accordance with the California Budget Act of 1973 could be legally restrained under the provisions of the Economic Stabilization Act of 1970, as amended. The authority delegated by Congress to the President to implement and enforce wage and salary controls expired on April 30, 1974 (87 Stat. 29).

It appears highly unlikely that there will be significant litigation involving wages and salaries of state employees under the Act. The questions presented here are at issue in no other cases to respondent's knowledge. There are no proceedings pending before the Cost of Living Council raising the questions involved in this case, and no litigation of this nature can arise with respect to wages and salaries paid for periods after April 30, 1974. The issues in this case, therefore, have no substantial continuing importance.

All the questions presented may be abstractly important and interesting, but there is no occasion

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have well founded reservations concerning the argument's applicability in Fry -- because of the important constitutional issue presented -- such concerns do not apply to the instant case, which is based upon the interpretation of an expired statute. Cf. Morris v. Weinberger, 410 U.S. 422 (1973).

for this Court to grant certiorari where the underlying statute is no longer in effect and there are few or no other pending cases involving the same issues. Since the Act has terminated, review should be denied because the issue is no longer of any continuing importance.3/ The Court should reserve consideration of this question until it arises in the context of an operative regulatory scheme of continuing significance.

In summary, this case is not appropriate for the exercise of this Court's certiorari jurisdiction under Rule 19 of the Rules of this Court. See Morris v. Weinberger, 410 U.S. 422 (1973); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

3/ This case presents no conflict of decision among the Courts of Appeal. Even if a conflict existed certiorari should be denied. Denial is the usual disposition of a petition where the statute in question has expired or has been amended "in a manner which will prevent the problem from arising in the future." Stern & Gressman, Supreme Court Practice (4th ed.), p. 156.

II. SECTION 218 OF THE ECONOMIC STABILIZATION ACT OF 1970, AS AMENDED, PRECLUDES THE ENFORCEMENT OF ORDERS OF THE COST OF LIVING COUNCIL, RESTRAINING THE PAYMENT OF SALARY INCREASES TO CALIFORNIA STATE EMPLOYEES, AFTER THE EXPIRATION OF THE ACT

The Government contends that the Temporary Emergency Court of Appeals misinterpreted section 218 of the Act, and asserts that the statute prohibits the implementation of the salary increases in question. Because the very terms of the statute in question, section 218, are contrary to the Government's position, the Government, understandably, relies instead upon speculative reasoning and unfounded assertions[4/] to attempt to bolster its cause.

4/ Three examples of the unsupported speculative assertions relied upon by the Government include the following: (1) The decision of the Court below will encourage demands for higher wages in new agreements (Petition, pp. 8-9); (2) The decision creates windfalls for employees and will lead to further demands for salary increases and labor unrest (Petition, p. 10); and (3) Payment of the salary increases at this time would be highly inflationary (Petition, p. 10).

None of these contentions is supported by any facts. The Government offers no explanation of

Section 218 provides as follows:

"The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974; but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974."

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how the decision below is supposed to be directly tied to demands for higher wages in any new collective bargaining contracts. Since California State employees do not have collective bargaining rights, the Government must feel that somehow the decisions will affect collective bargaining contracts in other jurisdictions or other sectors, but neglects to state the supposed connection.

The "windfall" characterization is totally unfounded. The receipt by an employee of a salary increase that he was entitled to receive by law does not constitute a "windfall." In fact, in the instant case, the only reason that California employees received a comparatively large salary increase in 1973 was because they had been forced to forego normal cost of living salary increases in prior years. The 1973 pay increase was designed as a "catchup measure." See statistical table set forth in Appendix A.

Petitioner's reference to the supposed "inflationary" pay raise is surprising in light of the recent action taken by President Ford and the United States Senate with regard to a pay raise for federal employees.

The statute is patently clear. By its very terms section 218 precludes any enforcement action by the Government after April 30, 1974, unless one of the two stated exceptions is satisfied. The first exception provides that the Government can continue to litigate "any action or pending proceeding, civil or criminal, not finally determined on April 30, 1974." The second exception concerns "any order or proceeding based upon any act committed prior to May 1, 1974." The Temporary Emergency Court of Appeals correctly held that neither of these two exceptions applied to the instant case.

The Government relies on the second exception, citing as examples of "act[s] committed prior to May 1, 1974" (1) the enactment of the California Budget Act of 1973 (Stats. 1973, Ch.129), (2) the review of the pay increase and the Decision and Order issued by the Cost of Living Council, and (3) the lawsuit filed by respondents to seek

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On August 31, 1974, President Ford proposed a plan delaying a pay increase for federal employees from October 1, 1974, to January 1, 1975. Government Employee Relations Reporter (BNA) [hereinafter cited as GERR] , No. 571, p. A-2 (9-9-74). The Senate rejected the proposal, holding that the pay increase for the three months, which amounted to $700 million, was not unduly inflationary. GERR, No. 573, p. A-7 (9-23-74). The President relented and agreed to implement the pay increase effective October 1, 1974. GERR, No. 575, p. A-3 (10-7-74). Since Congress determined that $700 million pay increase for federal employees was not inflationary, it is difficult to understand the Government's attribution to Congress the intent to halt or delay a $60 million pay increase to state employees on grounds of inflation.

judicial review of the administrative action of the Council (Petition, pp. 11-12).[5] None of these alleged "acts" is of the type contemplated by section 218.

5/ The Government also asserts, in a footnote, that California created an illegal escrow. Petition, p. 12, fn. 11. The Government is unable to supply any details with regard to the alleged escrow. The evidence to the contrary is overwhelming. There was no escrow agreement; there was no expression of intent or other provision to pay all of the sums when controls expired; there was no statute or regulation which prohibited passage of the California Budget Act of 1973 and the Collier Bill, Cal.Stats 1973, Ch. 1136; and there was no payment on May 1, 1974, despite the fact that there was no enforceable order in effect which precluded payment. Furthermore, the Government has agreed that California had fully complied with the Decision and Order of the Council during the period of controls (Petition, Appendix A, pp. 11a-12a).

Petitioner's reliance on United States v. International Brotherhood of Electrical Workers, Local No. 11, 475 F.2d 1204 (Em.App. 1973), is misplaced. The Court below, which determined that Local 11 was inapplicable, had a great degree of expertise in this matter since two of the justices who participated in the decision below also joined in the opinion in Local 11 (Chief Justice Carter and Justice Christensen). Since the justices obviously knew the parameters of the Local 11 decision, they were uniquely qualified to determine its inapplicability, due to the actual lack of an escrow agreement and due to the different system of controls in effect, to the instant case. See Petition, Appendix A, pp. 14a-16a.

The Temporary Emergency Court of Appeals concluded that in order to come within the second exception to section 218, an "act" must constitute a violation of the Economic Stabilization Act (Petition, Appendix A, p. 11a). This interpretation is manifestly correct. Section 218 provides that the expiration of the Act shall not be a bar to a Government lawsuit "based upon any act committed prior to May 1, 1974." Since Congress did not intend that the Government should become a vexatious litigant and file lawsuits based upon any actions whatsoever, even those fully in accord with the Economic Stabilization Act, the term "act" must be limited to those matters which are not in accord with the Economic Stabilization Act. Hence, the term "act" must mean violations or actions illegal under the Act. Any other interpretation would be absurd.

Examination of the judicial history of prior control acts compels this result. For example, in Talbot v. Woods, 164 F.2d 493, 496 (Em.App. 1947), the Court held that the savings clause of the Emergency Price Control Act of 1942, that Act's equivalent to section 218, referred to enforcement proceedings predicated on violations occurring while the Act and regulations were still in effect. See also Standard Kosher Poultry v. Clark, 163 F.2d 430 (Em.App. 1947).

The first alleged "act", enactment of the State Budget Act, does not constitute a violation of the statute nor does it provide a basis on which the Government could file any type of meritorious "action or proceeding" after April 30, 1974. If the Budget Act had been implemented after an administrative order prohibiting such, then there would have been an "act" upon which to base legal action. Absent such, mere passage of the law does not give rise to a post-expiration cause of action against California.

The second "act" relied upon, the action of the Federal Cost of Living Council in reviewing the California budget provisions and the issuance of a Decision and Order by that Council, are acts of the Federal Government and cannot be attributed to the State of California or its employees. To assert this as an "act" giving rise to a cause of action against California is to reach the zenith of absurdity. The only act "committed" by California and its employees in this regard was to invoke the statutory right of filing requests for review. Certainly this cannot be the basis upon which to file an enforcement action against California and its employees.

The third "act" relied upon, the seeking of administrative and judicial review of the Council's order, reveals the inherent weakness of the Government's position. If the Government case is in such a posture that it feels compelled to assert that California's exercise of statutory and constitutional rights to judicial review opened the door to retaliatory action by the Government, then it is obvious that the petition is totally devoid of merit. What the Government is asking this Court to hold is that by exercising their due process rights, as well as statutory right, to judicial review of the administrative determination, California and its employees should suffer a penalty in the form of an enforcement action against them that would have been unavailable had not their rights to judicial review been exercised. Merely to state the argument is to refute it.6/

6/ Petitioners also urge that the civil action filed by California and its employees to seek judicial review of the Council's decision constitutes a "pending proceeding" coming within the first exception to section 218. Petition, p. 13, fn. 12. This argument is relegated to a footnote,

The thesis of the Government's case, that California and its employees committed "acts" prior to the expiration of the Economic Stabilization Act which give rise to a post-expiration cause of action, is expressly refuted by the Government's own admissions. In its complaint in this action, filed in the District Court on May 8, 1974, more than a week after the expiration of the Act, the Government conceded that "[a]t all times defendants herein have complied with said Decision and Order and have not paid out any salaries or wages in excess of said Decision and Order." (Record on Appeal, p. 3; see Petition, Appendix A, pp. 11a-12a.) Hence, the Government has conceded itself out of court.

The Government attempts to salvage its case by arguing that section 218 contains a third, unstated exception. It is urged that despite the clear, unequivocal language of the statute, authority remains to control salary payments under the guise of a "work performed" rationale; i.e., that payments cannot be made for work performed during the period August 15, 1971, to May 1,

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the Government apparently feeling that it did not warrant being placed in the text. This contention again urges that California be penalized for exercising its rights. Such a proposition is manifestly incompatible with our system of law. The Emergency Court rejected this contention and stated the following: "It seems beyond cavil that California's filing of the judicial review proceedings is not the kind of 'pending proceeding' that the Government can use as a justification for bringing this suit." Petition, Appendix A, p. 10a.

1974 (Petition, pp. 8, 16). The Act is expressly to the contrary. Section 218 provides that "the authority to ... enforce orders and regulations ... expires at midnight April 30, 1974." There is no third exception covering the Government's "work performed" contention.

III. THE GENERAL SAVINGS STATUTE, 1 U.S.C. SECTION 109, IS INAPPLICABLE

The Government contends that the General Savings Statute, 1 U.S.C. § 109, continues indefinitely the operative provisions of the Economic Stabilization Act and postpones indefinitely the provisions of section 218 proscribing the enforcement of Council orders after April 30, 1974 (Petition, pp. 14-16). If the argument of the petitioner were correct, it would mean there would be no such thing as a temporary statute, because under the Government's interpretation, the General Savings Statute operates to continue ad infinitum the provisions of every temporary statute.

The General Savings Statute, 1 U.S.C. § 109, provides in pertinent part as follows:

> "The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such a penalty, forfeiture or liability." (Emphasis added.)

As applied to the instant case, the General Savings Statute is concerned with any penalty, forfeiture or liability "incurred under" the Economic Stabilization Act of 1970, as amended. The United States has conceded that no such liability was incurred under the Act by California (Record on Appeal, p. 3; Petition, Appendix A, pp. 11a-12a). Since no liability was incurred under the Act while it was in force, and since no liability can be incurred under it after expiration, the General Savings Statute is inapplicable.

This result is compelled by a decision rendered by this Court which construed a prior temporary wage stabilization statute. In Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1953), this Court held that the General Savings Statute applied only to violations of a temporary statute, the Defense Production Act of 1950, occurring while the temporary statute was still in effect.

> "The precise object of the General Savings Statute is to prevent the expiration of a temporary statute from cutting off appropriate measures to enforce the expired statute in relation to violations of it, or of regulations issued under it, occurring before its expiration. United States v. Allied Oil Corp., 341 U.S. 1, 5; Fleming v. Mohawk, 331 U.S. 111." (Emphasis added.)
> 347 U.S. 554-55.

See also Quirk v. United States, 161 F.2d 138, 143 (8th Cir. 1947). The Government is unable to cite any authority which supports its position that it can bring suit after the expiration of the Act to enjoin acts occurring after the Act was permitted to expire. Its contention flies in the

face of the established law and must be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

Loren E. McMaster
Attorney for Respondents
James Coan and California
State Employees'
Association

TABLE 1

Comparison of Increases in Salaries Reflected by Collective Bargaining Settlements with Increases in State of California Salaries

	1968	1969	1970	1971	1972	1973	Simple Cov.	Compound Average
Private Industry Collective Bargaining Settlements (1)	6.5	9.3	14.9	13.2	11.0	6.2	61.1	78.5
State of California Salary Increases	5.7	5.6	5.2	0	8.4	7.7	32.6	37.1

(1) Over the life of contract wage rate changes in nonmanufacturing private industry exclusive of construction where settlements affected 1,000 workers or more, annual periods ending June 30 of each year.

Source: State of California Department of Finance; U.S. Department of Labor, Bureau of Labor Statistics, Current Wage Developments.